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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

EAC 06 117 52915

Office: TEXAS SERVICE CENTER

Date:

JAN 22 2007

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software and development consulting firm. It seeks to employ the beneficiary permanently in the United States as an IT manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on January 24, 2006. The proffered wage as stated on the ETA Form 9089 is \$79,997 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 2003, a gross annual income of \$200,000, no net income and six employees. In support of the petition, the petitioner submitted no evidence regarding its finances.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 8, 2006, the director issued a notice of intent to deny based on that issue. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for the petitioner for 2005, financial statements for the first six months of 2006 and its quarterly wage and withholding reports for the first two quarters of 2006 reflecting *two* employees.

The tax return reflects the following information:

Gross income	\$93,322
Net income	\$20,868
Wages	\$32,421
Current Assets	\$21,339
Current Liabilities	\$7,266
Net current assets	\$14,073

The financial statements reflect the following information for the first six months of 2006:

Gross income	\$60,287.57
Net income	\$28,949.30
Wages	\$15,453.21
Current Assets	\$49,345.16
Current Liabilities	\$6,323.28
Net current assets	\$43,021.88

Counsel asserted that these numbers should be doubled to reflect annual amounts. As the net current assets as of June 30, 2006 doubled (\$86,043.76) are more than the proffered wage, counsel concludes that the financial statements reflect the petitioner's ability to pay that wage in 2006. None of the above data is consistent with the petitioner's claim on the petition, filed in March 2006, that it had annual gross income of \$200,000 and employed six employees.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 19, 2006, denied the petition.

On appeal, counsel asserts that the petitioner is in remarkable financial condition for a start-up company and that the 2005 tax return reflects a potential for better results in 2006. Counsel further asserts that we should consider the revenues for the petitioner that the beneficiary will generate, as evidenced by an employment contract for her services. Finally, counsel asserts that we should consider the assets of the petitioner's shareholders. The petitioner resubmits previously submitted evidence and also submits financial documentation relating to the petitioner's shareholder.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the

proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it has employed and paid the beneficiary the full proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2006. While the petitioner need not demonstrate an ability to pay the proffered wage in 2005, those are the most recent tax returns available. In 2005, the petitioner shows a net income of only \$20,868 and net current assets of only \$14,073, insufficient to demonstrate the ability to pay the proffered wage.

According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Even if we were to accept the unaudited financial statements submitted, they are not persuasive. Assuming the petitioner can maintain its six-month level of income, it might realize an annual net income of \$57,898.60 in 2006. This amount, however, is less than the proffered wage. Balance sheet figures, such as net current assets, are "snap-shot" figures as of a specific date. They do not represent increases over a specific period of time like net income. As such, counsel is not persuasive that doubling the petitioner's net current assets from one date has any value in providing a reasonable prediction of net current assets six months in the future.

Counsel's reliance on the assets of the petitioner's shareholder is not persuasive. A corporation, even a subchapter S corporation, is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

The petitioner also relies on a contract for the beneficiary's services. The record, however, contains no evidence regarding the financial situation of the company that has contracted for these services. Thus, the petitioner is essentially attempting to transfer its own burden of establishing an ability to pay the proffered wage to another company that has no obligation to present to us evidence of its ability to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the contract wage.

Finally, the bona fides of the job offer is questionable. The petitioner has not demonstrated the gross annual income claimed or the six employees claimed. In fact, nothing in the record suggests that it has ever employed more than two employees.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage as of the priority date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.